IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-758

GASORAMA, INC.,

Petitioner,

v.

IMPERIAL GAS COMPANY OF PUERTO RICO, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

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November 13, 1979

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No. ____

GASORAMA, INC.

Petitioner,

v.

IMPERIAL GAS COMPANY OF
PUERTO RICO, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

The petitioner, Gasorama, Inc., prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the Commonwealth of Puerto Rico denying review of a summary judgment against petitioner entered by the Superior Court, Caguas part in May 9, 1979.

OPINIONS BELOW

There was no formal opinion of the Supreme Court of the Commonwealth of Puerto Rico in *Imperial Gas Company of Puerto Rico, Inc. v. Gasorama, Inc.*, R-79-212, the Resolutions denying review are set forth as Appendix A (1), (2), (3). The summary judgment rendered by the Superior Court, Caguas Part, civil case 78-5, is set forth herein as Appendix B.

JURISDICTION

The jurisdiction of the Court is invoked under the provisions of 28 U.S.C. 1258 (3).

QUESTIONS PRESENTED

Did the Commonwealth Court deprive petitioner of its constitutional right to due process by not allowing it to assert a defense and a counter claim against respondent under the federal legislation regulating the price of petroleum gas products and by denying petitioner the right to make discovery pertaining to documents relevant to its federal claim?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

"...nor shall any state deprive any person of life, liberty, or property, without due process of law; ..."

Federal Statutes:

1. Public Law 91-379; 84 Stat. 796 - known as the "Economic Stabilization Act of 1970."

"§ 211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court."

STATEMENT OF THE FACTS

On or about January 4, 1978 Imperial Gas Company of Puerto Rico, Inc. filed a collection action against Gasorama, Inc., the petitioner herein. This complaint was later amended. The allegations against Gasorama stated a principal claim for $125,754.80 related to the sale of fuel products, materials and services delivered to Gasorama at its different facilities throughout Puerto Rico during 1977.

Gasorama filed its answer to the Complaint on October 11, 1978 after unsuccessfully trying to obtain certain documents corresponding to the price of gas sold to it by Imperial between January 1974 and September 1977. It was Imperial's contention that the documents in question bore no relevancy to its collection claim.

Gasorama in its defenses denied the debt in part or in whole because Imperial had billed and overcharged it in violation of the federal legislation and regulations. In

addition to the answer Gasorama filed a counter claim against Imperial alleging that Imperial's charges were in violation of the federal statutes and regulations controlling the price of petroleum gas products in effect between January 1974 and September 30, 1977. The counter claim, however, did not state what the amount overcharged was because Imperial had failed to provide the necessary documentation.

Gasorama's request for production of documents for inspection was opposed by Imperial on the grounds that Gasorama's contention could "only be raised in a federal court".

A motion for Summary Judgment was filed by Imperial in which it maintained that judgment should be entered against Gasorama among other things for "frivolous persistence on onerous discovery of irrelevant evidence, refusal to answer a simple interrogatory submitted by plaintiff - in order to delay the payment of the debt". The essence of this motion for purpose of this petition was that "under the applicable federal regulations the state court, Puerto Rican courts included, lack jurisdiction to entertain claims based on alleged violation of federal regulations governing the prices at which LPG may be sold in Puerto Rico". Furtheron, the motion stated, "Even if the alleged claim by Gasorama against Imperial, which is based on groundless allegations of violations to the federal regulations, were supported by sworn statements, the same would be *immaterial* to the case, as the Federal Court for the District of Puerto Rico is the sole court which could entertain in the same. To that effect, the filing of said claim within this suit cannot be directed to any other purpose but to continue delaying the proceedings, due to the economic reasons already mentioned."

Finally, on May 21, 1979 a Summary Judgment was entered against Gasorama. The judgment granted Imperial's total remedy. The court concluded it had no jurisdiction as maintained by Imperial, stating: "The plaintiff is correct insofar §§ 210 and 211 (of the Economic Stabilization Act) clearly confers original and exclusive jurisdiction to the Federal District Court to entertain claims for damages and other purposes, arising of violations to said law". It then added, notwithstanding, that said violations were nonexistent because the law had already expired.

A motion for reconsideration was timely filed on May 14, 1979. Gasorama among other things pleaded that the Court had unjustly entered judgment concluding there were no material controversies on the amounts claimed. It also maintained the Court had erred in finding that the Economic Stabilization Act had expired. Gasorama argued that what the Court was referring to was that § 401 (b)(4) had been abolished by PL 94-163, Title 4, 89 Stat. 946, dated Dec. 22, 1975. It was pointed out that the controls legislation was expanded in 1973 by PL 94-163 and that in December 22, 1975, Congress again legislated measures to regulate the increase of cost through the establishment of the "pass through" cost measures.

The motion for reconsideration was denied by the Superior Court in a resolution dated May 18, 1979 and entered on May 21, 1979. The resolution added that defendant was confused insofar as the Energy Conservation Act PL 94-163 had a different purpose from the Economic Stabilization Act.

On June 5, 1979 Gasorama timely filed with the Supreme Court a Writ of Revision for review of the

Summary Judgment. The basic question was whether the Superior Court had failed to allow Gasorama a reasonable opportunity to make the necessary discovery to allow it to prepare its case adequately and to defend itself against Imperial's claim.

The Supreme Court of Puerto Rico refused to review, notwithstanding the federal law questions raised in the petition. Two requests for rehearing were timely made and both were denied.

REASONS FOR GRANTING THE WRIT

Gasorama was denied its day in Court.

During the years that Gasorama made business with Imperial, Congress had authorized restraints in prices throughout the Nation, particularly in relation to petroleum products to avert a crisis facing the Nation. Gasorama never complained but in December 2, 1977, it started querring about the prices. This was done through letters requesting the refinery delivery tickets of bulk sales to Imperial and the refinery notices to Imperial as to price increases between January 1, 1974 and September 30, 1977. This querry was specifically intended to determine if Imperial was complying with the price regulations ordered by Congress. In return, Imperial sued Gasorama for the price of gas products and other services sold during 1977.

The production of documents for inspection unsuccessfully insisted on during the litigation by Gasorama was a continuation of the investigation commenced prior to the litigation. The documents being sought should contain the pertinent information to determine if Imperial had violated the Congressional pricing policy. They would substantiate Gasorama's

defense and its counterclaim against Imperial for overcharges made in violation of the federal legislation. The Superior Court, however, declared itself without jurisdiction to entertain Gasorama's pleas.

I. The Right To Be Heard

"Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense", was postulated in *Baldwin v. Hale*, 1 Wall, 223-233, 17 L. Ed 531 (1963). Then in *Windsor v. McVeigh*, 93 US 274, 276, 23 L. Ed 914, 915 this Supreme Court proferred the following question: "Whether the property of the plaintiff could be forfeited by the sentence of the Court in a judicial proceeding to which he was not allowed to appear and make answer to the charges against him, upon the allegation of which the forfeiture was demanded". The Court answered its own question like this:

> " ... 'If assailed there, he could defend there. The liability and right are inseparable, a different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice'. 11 Wall 267. The principle as stated in this language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all

> nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal".

This Supreme Court has held through a long standing rule "that due process requires, at a minimum, that absent a countervailing state interest or overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "wherever one is assailed in his person or his property, there he may defend..." Furtheron, the Court went on to state: "A state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause". *Boddie v. Connecticut*, 401 US 371, 21 L. Ed 113, 91 S. Ct. 780, (1970). *See also Fuentes v. Shevin*, 407 US 67, 32 L. Ed2d 556, 92 S. Ct. 1983 (1972). This Court has also held in more than on occasion that Puerto Rico is subject to the Due Process requirements of the U.S. Constitution. *Torres v. Commonwealth* _____ U.S. _____ 47 LW 4717, (June 18, 1979). *Calero-Toledo v. Pearson Yatch Leasing Co.*, 466 U.S. 663 (1974).

II. Federal Questions Raised As Defense Do Not Inhibit State Court's Jurisdiction

It has been continuously stated that in order to determine federal jurisdiction, the courts will look solely at plaintiff's complaint rather than any subsequent pleading. That is the fundamental rule. *See St. Mary's Hospital of East St. Louis, Inc. v. Ogilvie* F.2d 1324 (1974); *Lindy v. Lynn*, 501 F.2d 1367 (1974); *Lo-VACA Gathering Co. v.*

The Railroad Commission of Texas, 565 F.2d 144 (1977); *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375 (1978).

Imperial's claim in the Superior Court was a simple collection action. No indication is given that it's action was based on a federal question. The matter was raised by Gasorama without specifying under which federal statute it would defend. Clearly there was no reason to deny Gasorama's assertion, because its defenses and counterclaim arose in part under a federal law which prescribed that "The district courts of the United States, shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, ..." particularly, when it goes on the state: "except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense ... raised in any proceeding before such court." Besides, "a cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States." *Tennessee v. Union and Planter's Bank*, 152 U.S. 454 (1893). *See also, Metcalf v. Watertown*, 128 U.S. 586 (1888); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908); *Taylor v. Anderson*, 234 U.S. 74 (1914); *Skelly Oil Co. v. Phillips Petroleum Co.* 339 U.S. 667 (1950); *Phillips Petroleum Co. v. Texaco, Inc.* 415 U.S. 125 (1974).

III. The Summary Judgment

The usefulness and fairness of summary judgments are well recognized when properly applied. This application

under the Rules of Civil Procedure for Puerto Rico is the same as the Federal Rules. In our case, however, it was improvidently granted. As in *Gray Tool Co. v. Humble Oil Refining Co.*, 186 F.2d 365, *Cert. den.* (1951) 341 U.S. 934, 71 S. Ct.

> "that this is another of those all too numerous instances of the misuse of the summary judgment procedure to cut a trial short; that here, as so often before, it has served only to prove that short cutting of trial is not an end in itself but a mean to an end, and that in the conduct of trials, as in other endeavors it is quite often true that the longest way around is the shortest way through".

A summary judgment should be granted "only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of he law". *Westinghouse Electric Corp. v. Bulldog Electric Products Co.*, 179 F.2d 139. A summary judgment does not terminate a controversy as a full adjudication, particularly, if the grant is improvident. "They merely return cases for the trials they ought in the first instance to have undergone, and generally with enhanced expenses, to say nothing of delay". Westinghouse (supra). *See also, Phoenix Savings and Loan Inc. v. Aetna Casualty and Surety Co.*, 381 F.2d 245 (4th Cir. 1967).

Since prior to the commencement of the action, Gasorama was trying to establish the invalidity of the prices being overcharged by Imperial; it therefore, immediately commenced its pretrial discovery by the production of documents that would substantiate the overcharges, but the Superior Court deprived Gasorama of obtaining the

necessary information. While the mechanism of production of documents is not strictly a "deposition", it is an exploratory device intended to uncover facts so that a propounder may thereafter prove his legal argument in a litigation. *See Town of River Junction v. Maryland Casualty Co.*, 110 F.2d 278, 134 ALR 727 (5th Cir.), *cert denied*, 310 U.S. 634, 60 S. Ct. 1077, 84 L. Ed. 1404 (1940). The only way that Gasorama could defeat Imperial's claim was through the establishment of illegal overcharges. Gasorama did not have the faintest interest in harrassing or delaying the litigation. It just wanted to defeat the claim filed against it.

We fall squarely within the framework proposed in *Washington v. Cameron*, 411 F.2d 705, 711 (1969) that "It is incumbent upon the party seeking answers to demonstrate that his inquiry is directed toward establishing the material facts and that upon receipt of those answers he will be armed to defend against that motion (for summary Judgment)". In the same context in *Barnes v. A. Sind & Associates*, 32 FRD 39, 41, reversed on other grounds, 341 F.2d 676, the Court of Appeals reversed because the District Court failed to give the opposing part "appropriate notice" of its right to contest the material facts set forth in the moving papers submitted in support of the motion for summary judgment. In *Johnson v. RAC Corporation*, 491 F.2d 510, 514, (1974), the Court held that a party "should have been afforded the opportunity as the procedure followed in Barnes suggests, to employ discovery in order to counter, if he could, the facts set forth in the defendant's affidavit or to establish a factual basis for his action against the defendant; and this is especially so since the facts on which defendant predicates its motion in this respect lie

peculiarly within the knowledge of the defendant." Another case in point is *Parish v. Howard*, 459 F.2d 616 (1972), where discovery was completed and the party given sufficient opportunity to develop and present to the trial court the nature of the circumstances surrounding its allegations, before a motion for summary judgment was granted.

CONCLUSION

The decision below frustrates the constitutional mandate for due process. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted.

IN THE SUPERIOR COURT OF PUERTO RICO
CAGUAS PART

IMPERIAL GAS COMPANY OF PUERTO RICO, INC.,

Plaintiff

v.

GASORAMA, INC.,

Defendant

Civil No. CS-78-5

COLLECTION OF MONEY

SUMMARY JUDGMENT

This is an action for collection of money involving $112,602.98, plus $13,091.94 for a promissory note, and $3,500 for expenses, costs, and attorney's fees. The original complaint was filed on January 4, 1978, and amended on May 15, 1978, in order to include the collection of the promissory note.

Defendant finally answered the amended complaint on October 18, 1978, and in its answer included a counterclaim alleging illegal collection for liquid gas on the part of plaintiff from January 1974 to September 30, 1977, and a violation of the federal laws and regulations in effect.

Before filing its answer to the complaint on October 18, 1978, defendant persistently asked plaintiff to produce a series of documents dating from before 1977, the year on which plaintiff's original cause of action is based. Plaintiff supplied all the evidence relating to the year 1977 and to the promissory note paid as documentary evidence in support of its cause of action.

In its determination to obtain the documents corresponding to 1974 on, defendant moved for several orders and hearings. Some of said orders are inconsistent among themselves in

the sense that on March 27, 1978, the court ordered the production of the documents covering the period from 1974 to 1977; said order was subsequently set aside through another order where the court stated that the defendant had persistently delayed the proceedings. Finally, in November 1978, the court returned to its original position of allowing the production of the documents requested by the defendant.

Lastly, plaintiff filed a motion for summary judgment accompanied by a sworn statement and a motion for the dismissal of the counterclaim. Defendant did not oppose the same with a sworn statement and merely reiterated its right to the production of the documents, among other allegations.

On March 23, 1979, which was the date set for arguing plaintiff's motion to dismiss and for summary judgment, the parties submitted their respective positions on the basis of the documents appearing in the record of the case.

There is no material controversy in connection with the following facts:

1. Gasorama, Inc. owes Imperial Gas Company of Puerto Rico, Inc. the following amounts:

(a) $112,602.98 for materials, fuel, and services supplied during 1977.

(b) $13,091.94 of principal, plus the stated interest at the rate of 9% per annum, which on April 30, 1978 amounted to $450.36, plus interest accrued until the principal obligation is paid in full. Said debt is evidenced by a promissory note executed before a notary on October 19, 1975. The sum of $3,500 was also agreed to cover expenses, costs, and attorney's fees.

(c) That steps were taken to collect the above-mentioned amounts before the complaint was filed, but they were unsuccessful.

(d) The amounts claimed are due, liquid and payable on demand.

The Economic Stabilization Act of 1970, 84 Stat. 799, Pub. L. No. 91-379, and its 1971 and 1973 amendments, 85 Stat. 743, Pub. L. No. 92-210 and 87 Stat. 27, Pub. L. No. 93-28, was in effect only during the period between 1970 and 1974.

In this case filed in 1978, defendant raises as a defense the violation of the provisions of a law which became effective on August 15, 1970, and expired on April 30, 1974, as provided in Section 218 of the act itself. Therefore, since said act has already expired this defense is meritless.

In support of its opposition, defendant cites some cases wherein the act was applied while it was in force, during the period comprised between 1970 and 1974. But as we have shown above, the act, which expired in 1974, is not applicable to certain facts which took place in 1977.

Plaintiff raises the issue of this court's lack of jurisdiction to entertain a claim based on the provisions of the Economic Stabilization Act. Plaintiff is right, for sections 210 and 211 expressly grant U.S. District Courts original and exclusive jurisdiction to entertain

claims for damages and other types of claims arising from violations to said act. Besides, as we said before, said violations do not exist, for the facts took place after the expiration of the act.

For the foregoing reasons, pursuant to Rules 36.5 and 44.4(e) of the Rules of Civil Procedure in effect, the Court renders judgment in favor of plaintiff for the amounts mentioned above, supra 1, a, b, plus legal interest from the date when the cause of action regarding the $112,602.98 (1-a, supra) arose, plus $5,000 for attorney's fees.

The counterclaim is dismissed.

TO BE ENTERED AND NOTIFIED.

Given in Caguas, Puerto Rico, this 25th day of April, 1979.

(Sgd)

Roberto R. Muñoz Arill
Superior Court Judge

IN THE SUPERIOR COURT OF PUERTO RICO

CAGUAS PART

IMPERIAL GAS COMPANY OF PUERTO RICO, INC. — CIVIL NO. CS-78-5

Plaintiff

v. — COLLECTION OF MONEY

GASORAMA, INC.

Defendant

EXPLANATORY RESOLUTION AND ORDER

We hereby make clear that the term "claim" appearing on page 3 of our judgment of April 25, 1979, naturally refers to the counterclaim.

We also clarify plaintiff's possible confusion in its Motion for Reconsideration, which we hereby deny, where it cites the Energy Conservation Act, Pub. L. No. 94-163 in the last paragraph of page 3. Said Act has an entirely different purpose from the Economic Stabilization Act of 1970 discussed in the judgment. See the legislative history of both acts.

TO BE NOTIFIED.

In Caguas, Puerto Rico, this 18th day of May, 1979.

(Sgd.) ROBERTO R. MUÑOZ ARILL
SUPERIOR COURT JUDGE

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

Imperial Gas Company of P.R., Inc.,

Plaintiff-respondent

v. No. R-79-212 Review

Gasorama, Inc.,

Defendant-petitioner

RESOLUTION

In San Juan, Puerto Rico, this 28th day of June, 1979.

The petition for review is hereby denied.

It was so agreed by the Court and certified by the Clerk. Mr. Chief Justice Trías Monge and Mr. Justice Martín took no part in this decision.

Ernesto L. Chiesa
Clerk

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

Imperial Gas Company of P.R. Inc.,

Plaintiff-respondent

v. Review

Gasorama, Inc. No. R-79-212

Defendant-petitioner

Division composed by its President Mr. Justice Torres Rigual, Mr. Justice Martín and Mr. Justice Díaz Cruz.

RESOLUTION

In San Juan, Puerto Rico, this 26th day of July, 1979.

The motion for reconsideration is denied.

It was so agreed by the Court and certified by the Clerk.

Ernesto L. Chiesa
Clerk

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

Imperial Gas Company of P.R., Inc.

Plaintiff-respondent

v. No. R-79-212 Review

Gasorama, Inc.,

Defendant-petitioner

Division composed by its President Mr. Justice Dávila and by Mr. Justice Irizarry Yunqué and Mr. Justice Negrón García.

RESOLUTION

In San Juan, Puerto Rico, this 16th day of August, 1979.

The motion for reconsideration is denied.

It was so agreed by the Court and certified by the Acting Clerk.

Miguel Mercado Ruiz
Acting Clerk

CLERK'S CERTIFICATE

I, Ernesto L. Chiesa, Clerk of the Supreme Court of of Puerto Rico, DO HEREBY CERTIFY:

That the annexed documents are photocopies of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the Summary Judgment rendered by the Superior Court of Puerto Rico, Caguas Part, on April 25, 1979, the Explanatory Resolution and Order of May 18, 1979, and three Resolutions of this Supreme Court dated June 28, 1979, July 26, 1979, and August 16, 1979, in the case of Imperial Gas Company of P.R., Inc. v. Gasorama, Inc.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 9th day of November 1979.

Ernesto L. Chiesa
Ernesto L. Chiesa
Clerk
Supreme Court of Puerto Rico

By: Miguel Mercado
Under-Secretary

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-758

GASORAMA, INC.,

Petitioner,

v.

IMPERIAL GAS COMPANY OF PUERTO RICO, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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IN THE

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IMPERIAL GAS COMPANY OF PUERTO RICO, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

Respondent, Imperial Gas Company of Puerto Rico, Inc. respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Supreme Court of Puerto Rico's decision in this case.

Opinions Below

The opinions below, which are not reported, appear as Appendices to the Petition:

Resolutions of the Supreme Court of Puerto Rico dated June 28, July 26, and August 16, 1979:

Petition Appendix A(1), (2), (3);

Summary Judgment of the Superior Court of Puerto Rico, Caguas Part:
Petition Appendix B.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. § 1258(3). For the reasons set forth below, Respondent respectfully submits that this Court lacks jurisdiction to entertain the Petition.

Questions Presented

1. Whether an important and controlling federal question is presented by an order of the Supreme Court of Puerto Rico denying a petition to review the decision of a trial court granting a motion for summary judgment.

2. Whether an order of the Supreme Court of Puerto Rico denying a petition for review, entered in that court's discretion pursuant to the Judicial Code of the Commonwealth of Puerto Rico, may be reviewed under 28 U.S.C. § 1258(3).

Statutes Involved

The relevant statutes and Rules of Procedure are reprinted in Appendix I and are as follows:

1. Sections 1258 and 1293 of the Judicial Code, 28 U.S.C. §§ 1258 and 1293;
2. Section 37 of the Judicial Code of Puerto Rico, P.R. Laws Ann. Tit. 4, § 37;
3. Rule 36 of the Puerto Rico Rules of Civil Procedure, P.R. Laws Ann. Tit. 32, App. II R 36;
4. Rule 34.6 of the Puerto Rico Rules of Civil Procedure, P.R. Laws Ann. Tit. 32, App. II R 34.6;

5. Rules 39.2 and 39.3 of the Puerto Rico Rules of Civil Procedure, P.R. Laws Ann. Tit. 32, App. II R 39.2 and R 39.3;
6. Rule 17 of the Rules of the Supreme Court of Puerto Rico, P.R. Laws Ann. Tit. 4, App. I-A R 17.

Statement of the Case

The Petition seeks review of the judgment of the Supreme Court of Puerto Rico declining to review the lower court's grant of a motion for summary judgment. Under 28 U.S.C. § 1258, that is the only judgment in this case which is subject to review by this Court. The question petitioner presents for review, however, relates not to the action of the Supreme Court of Puerto Rico but to the rulings of the Superior Court. Thus, the essence of the Petition is that Gasorama, Inc. ("Gasorama") was "denied its day in court" by the trial court's failure to direct the production of certain documents and by its rejection of certain defenses and a counterclaim in a collection action initiated by Imperial Gas Company of P.R., Inc. ("Imperial"). In reality therefore, Gasorama is seeking review of a discovery ruling made by the trial court and its decision as to the propriety of a counterclaim and certain defenses. This Court is without jurisdiction to review those rulings. To the extent that review is sought of the judgment of the Supreme Court of Puerto Rico denying a petition to review the judgment of the trial court, that was a decision made in the exercise of the court's discretion and presents no question worthy of consideration by this Court.

Petitioner's Statement contains a number of inaccuracies and significant omissions. The discovery issue arose out of an extensive request for the production of documents (R. 25)[1] made by Gasorama on March 15, 1978 even though

1. R. references are to the record on appeal.

it had not filed a responsive pleading as of that time. Imperial opposed the requested production, pointing out *inter alia* that Gasorama had access to the documents sought and that their production was unnecessary inasmuch as Gasorama had recognized the validity of the debt which formed the basis for the collection action (R. 34). A hearing was set for May 31, 1978 and, after a continuance was requested by Gasorama (R. 99), it was rescheduled for June 8, 1978. Gasorama did not appear at the hearing (R. 100). Instead of denying the discovery out of hand, the trial court directed a partial production (R. 42). When Gasorama sought reconsideration, another hearing was set for September 11, 1978. On September 6, 1978 Gasorama requested still another continuance for at least 70 days (R. 106). Undoubtedly influenced by this request and the fact that Gasorama had earlier filed no fewer than three additional motions for extensions of time (R. 96, 101, 102), the trial court denied the motion for reconsideration and entered a finding of dilatory conduct on the part of Gasorama (R. 47).[2]

On December 22, 1978, Imperial moved for summary judgment, relying on an affidavit establishing the amount of the debt and the fact that it was due (R. 53).[3] Imperial also submitted an authenticated letter from Gasorama's officials in which they recognized the validity of the debt. In opposing the motion, Gasorama failed to file the necessary affidavits. Even after this failure was emphasized by Imperial, Gasorama elected to rest on its pleadings and judgment was entered against it.

2. By the time the case ended, Gasorama had filed four additional motions for continuances or extensions of time, for a total of ten. (R. 117, 119, 120, 121).

3. After the matter was briefed, Imperial ultimately conceded that the court had jurisdiction to consider Gasorama's federal claims as defenses (R. 74).

Petitioner then filed a petition for review before the Supreme Court of Puerto Rico and stated as the question presented:

> Whether the Superior Court erred in entering judgment without allowing petitioner-defendant the opportunity to effect discovery and adequately prepare its case and defend against Plaintiff's complaint. (R. 9).

After the petition for review was denied, Gasorama filed a motion for reconsideration and, after its denial, filed yet another motion which was also denied.

The issues in this collection action were decided, and decided properly, on the merits. The Petition is the latest in a series of attempts by Gasorama to overturn an adverse decision, a decision which resulted in large part from its own dilatory tactics and failure to comply with the applicable rules. There is nothing in this case which warrants the attention of this Court and the Petition for Writ of Certiorari should be denied.

ARGUMENT

I.

Petitioner improperly seeks review of the judgment of the Superior Court.

Petitioner is apparently uncertain as to which judgment below this Court should review. Although it asks that a writ be issued to review the judgment of the Supreme Court of Puerto Rico denying the petition for review, the Questions Presented refer to "the Commonwealth Court" and relate to the action of the trial court. Since it is the decision of the trial court of which Gasorama complains and issue is not taken with the action of the Supreme Court of Puerto Rico, Petitioner is apparently seeking re-

view of the judgment of the Superior Court. To the extent that Petitioner does so, this Court is without jurisdiction.

Section 1258 of Title 28 of the United States Code expressly provides for review by certiorari only of "[f]inal judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico".[4] It does not provide for the review of a judgment of the Superior Court of Puerto Rico or any other inferior court and this Court therefore has no jurisdiction to review the judgment of the trial court.

II.

The denial of a petition for review is within the discretion of the court below and may not be reviewed by writ of certiorari.

Review is no more appropriate even if the Petition can be read as seeking review of the judgment of the Supreme Court of Puerto Rico. That judgment was the denial of a petition for review, was within the discretion of that court, and does not present a question worthy of review by this Court.

Gasorama did not seek an appeal as of right from the judgment of the Superior Court, even though such an appeal is provided for by the Judicial Code of Puerto Rico under certain circumstances.[5] Instead, Gasorama sought review of that judgment by the Supreme Court of Puerto Rico "through a writ of review to be issued at its discretion"

4. In this respect, § 1258 is the same as § 1293, which it superseded. Under § 1293, appeals to the Circuit Court of Appeals for the First Circuit were permitted only from judgments of the Supreme Court of Puerto Rico.

5. As discussed in more detail below, the Judicial Code provides for such an appeal when substantial constitutional questions are present. Petitioner's failure to pursue this avenue of appeal is tantamount to an admission that no substantial constitutional questions are present in this litigation.

P.R. Laws Ann. Tit. 4, § 37(b). Thus, the decision as to whether or not a judgment of the Superior Court will be heard by the Supreme Court is one which rests entirely within the discretion of that court. If a petition for review is denied, the only reviewable issue in connection with that decision is whether the denial was an abuse of discretion. This is confirmed by reference to 28 U.S.C. § 1293, the predecessor of § 1258. Under that section, pursuant to which appeals from judgments of the Supreme Court of Puerto Rico were to the Court of Appeals for the First Circuit, the only question which could be decided by the Court of Appeals was whether there had been an abuse of discretion in denying a petition for discretionary review. *International Basic Economy Corp.* v. *Blanco Lugo*, 267 F.2d 263, *further opinion*, 271 F.2d 437 (1st Cir. 1959), *cert. denied* 361 U.S. 948 (1960). Although appeals under § 1293 were as of right, the standard of review is the same. The only issue presented by the decision of the Supreme Court of Puerto Rico declining to review the decision of the trial court is whether that was an abuse of discretion. Such a question, however, is not among those which this Court reviews on writ of certiorari.

III.

There is no important or controlling question of federal law.

Under Rule 19 of the Supreme Court Rules, in deciding whether to review a decision of a state court, the Supreme Court first requires that there be "special and important reasons therefor" and generally will consider whether the court "has decided a federal question of substance not theretofore determined by this court, or has decided it in

a way probably not in accord with applicable decisions of this court." U.S. Sup. Ct. Rule 19(1)(a), 28 U.S.C. Not only were no federal questions decided by the Supreme Court of Puerto Rico, much less decided in a manner in conflict with the decisions of this Court, no federal questions were raised by Gasorama in its assignment of errors or questions presented for review to the Supreme Court of Puerto Rico. As stressed by Stern and Gressman:

> This jurisdictional factor is especially significant where the highest state court fails or refuses to pass expressly upon the federal question. In that situation, the party invoking the Supreme Court's jurisdiction has the burden of showing that he properly raised the question, so that the state court's failure to deal with it was not for want of proper presentation. The Court has stated many times that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Supreme Court Practice,* at 214 (5th ed. BNA) (citations omitted).

No such questions were presented in this case. As admitted in the Petition:

> The basic question [before the Supreme Court of Puerto Rico] was whether the Superior Court had failed to allow Gasorama a reasonable opportunity to make the necessary discovery to allow it to prepare its case adequately and to defend itself against Imperial's claim. Petition at 6.

Thus, there is simply no decision on a federal question which this Court may review. This fact cannot be obscured by the manner in which Petitioner has framed the Questions Presented. Gasorama states that this case presents a question as to whether it has been deprived of

its constitutional due process rights by the partial denial of discovery by the trial court. That, however, presents purely procedural questions, and, as discussed below, there are non-federal bases for the court's decision.

This is a simple collection action in which Petitioner conceded the underlying debt. That the issues in this case do not rise to a constitutional level is confirmed by the procedure followed by the Petitioner itself. Under P.R. Laws Ann. Tit. 4, § 37(a) there is an appeal as of right to the Supreme Court of Puerto Rico in cases involving substantial constitutional questions. Gasorama did not, however, file an appeal with the Supreme Court of Puerto Rico, which it surely would have done had it then thought constitutional issues were involved, but instead sought discretionary review. In addition, in its statement of the issues presented to the Supreme Court of Puerto Rico, Gasorama did not assert that any constitutional or even federal questions were involved.

It is thus more than apparent that, at this very late stage, Petitioner has tried to recharacterize its case as involving issues of constitutional dimensions so as to come within the guidelines for the exercise of review by this Court. That attempt fails totally and the non-constitutional, non-federal nature of the issues cannot be disguised.

IV.

The decision of the Supreme Court of Puerto Rico might have rested on non-federal grounds and certiorari is therefore inappropriate.

This Court has denied certiorari when it appeared that a decision to deny review might have rested on non-federal

grounds.[6] There are numerous non-federal grounds on which the decision by the Supreme Court of Puerto Rico to decline review might have rested:

> (1) Gasorama forfeited or waived its right to the discovery it requested. It first obtained a continuance of the hearing on the discovery question and then did not appear at the actual hearing. Then, when a ruling was entered, a request for reconsideration was filed and a second hearing date set. Petitioner attempted to have this hearing continued as well. These actions resulted in a finding by the trial court that Gasorama was unnecessarily delaying the proceedings. Rule 34.6 of the Puerto Rico Rules of Civil Procedure, P.R. Laws Ann. Tit. 32, App. II R 34.6, gives the trial courts in Puerto Rico ample discretion to prevent the misuse of discovery proceedings. In declining to grant the petition for review, the Supreme Court of Puerto Rico was adhering to the established rule that decisions on discovery in the Superior Courts of Puerto Rico are solely within the discretion of those courts and will not be disturbed in the absence of an abuse of discretion. The Supreme Court of Puerto Rico clearly articulated this rule in *Sierra* v. *Superior Court,* 81 P.R.R. 540 (1959), a case involving interrogatories which had been sustained by the Superior Court. In upholding the decision below, the court stated:

6. See *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952), where this Court stated:

> At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. (citations omitted) *See also Ellis* v. *Dixon,* 349 U.S. 458, 459 (1955).

> On appeal or review, our function is limited to deciding whether the Superior Court abused its discretion in rejecting those objections and ordering all the questions in the interrogatory to be answered. It is not up to us to determine the propriety of discovery as if we were a court of first instance. Although it is not beyond the ambit of review, unless it is shown that the lower court lacks a reasonable ground or hinders the substantial rights of a party, the judgment of the trial judge who presided [at] the proceeding should prevail. *Id.,* at 557 (footnote omitted).

(2) Gasorama's action in seeking no fewer than ten continuances and extensions of time constituted a failure to prosecute which warranted the dismissal of its defenses and counterclaim pursuant to Rules 39.2 and 39.3 of the Puerto Rico Rules of Civil Procedure, P. R. Laws Ann. Tit. 32, App. II R 39.2 and R 39.3.

(3) Gasorama's failure to oppose Imperial's Motion for Summary Judgment with counter-affidavits justified judgment against it pursuant to the provisions of Rule 36 of the Puerto Rico Rules of Civil Procedure, P.R. Laws Ann. Tit. 32, App. II R 36. As decided by the Supreme Court of Puerto Rico in the case of *Valcourt Questell* v. *Superior Court,* 89 P.R.R. 809, 814 (1964):

> the other party against whom the judgment is sought cannot defeat the motion by remaining idle and relying, as was done in this case, on the facts stated in the allegations of the complaint.
> *See also Cortes* v. *Heirs of Cortes,* 83 P.R.R. 660 (1961).

Petitioner attempted to justify its failure to file evidentiary affidavits by an unsworn assertion that the necessary information to prepare them was under the exclusive control of respondent. This allegation,

which was denied by Imperial, failed to meet the requirements of Rule 36.6 of the Puerto Rico Rules of Civil Procedure, P.R. Laws Ann. Tit. 32, App. II R 36.6. That Rule establishes the procedure to be followed when, for reasons which are well grounded and stated under oath, a party is unable to present by affidavits facts essential to justify its opposition to a motion for summary judgment.

(4) In its assignment of error or questions presented, Gasorama failed to allege properly and raise the objection that the trial court's partial denial of discovery amounted to a denial of due process. It also failed to raise properly the objection that the trial court had erred in ruling on the federal statutory claims, as required by Rule 17 of the Rules of the Supreme Court of Puerto Rico, 32 P.R. Laws Ann. Tit. 4, App. I-A R 17.

Conclusion

This is an action for the collection of a debt which Petitioner has sought to elevate to one involving issues of constitutional significance. In fact, it presents no questions which warrant consideration by this Court and Petitioner is, in reality, seeking from this Court the appellate review which the Supreme Court of Puerto Rico, in its discretion, declined to grant. The Petition having failed to set forth any basis for review by this Court under § 1258 of the Judicial Code, the Petition for a Writ of Certiorari should be denied.

December 13, 1979

Respectfully submitted,

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APPENDIX I—STATUTES

1. Sections 1258 and 1293 of the Judicial Code, 28 U.S.C. §§ 1258 and 1293 (Repealed. Pub.L. 87-189, § 3, Aug. 30, 1961, 75 Stat. 417).

§ 1258. Supreme Court of Puerto Rico; appeal; certiorari

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

§ 1293. Final decisions of Puerto Rico and Hawaii Supreme Courts

The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs.

2. Section 37 of the Judicial Code of Puerto Rico, P.R. Laws Ann. Tit. 4, § 37.

§ 37.—Review of rulings of Court of First Instance

(a) Save as provided in subsections (d) and (e) of this section, final judgments rendered by the Superior Court in civil cases involving or deciding a substantial constitutional question under the Constitution of the United States or of Puerto Rico shall be appealable to the Supreme Court. Provided, that final judgments rendered in criminal cases originated in the Superior Court and in trial de novo before the Superior Court, shall be appealable to the Supreme Court or to the appellate session or division of the Superior Court, as the Chief Justice may determine pursuant to the regulation adopted to such effect by the Supreme Court. Once the bill of appeal is filed, all proceedings in the Superior Court shall be stayed with respect to the judgment or the part thereof appealed from, or to the questions comprised therein; but the Superior Court may proceed with the action as to any other question involved therein not comprised in the appeal, and, if the judgment appealed from

provides for the sale of things susceptible of loss or deterioration, it may direct that same be sold and that the proceeds be deposited until the Supreme Court renders judgment.

(b) Any other final judgment of the Superior Court may be reviewed at the request of the aggrieved party by the Supreme Court through a writ of review to be issued at its discretion. The filing of a petition for review shall stay all proceedings in the Superior Court with respect to the judgment or that part thereof sought to be reviewed, or to the questions comprised therein, until the Supreme Court resolves. Notwithstanding, the Superior Court may proceed with the action as to any question involved therein not comprised in the writ of review, and, if the judgment appealed from, provides for the sale of things susceptible to deterioration, it may direct that same be sold and that the proceeds be deposited until the Supreme Court resolves.

(c) The Supreme Court of Puerto Rico may, in the exercise of its discretion, issue a writ of certification to bring forthwith before it, consider and resolve, any case pending on appeal or review before the Superior Court or an appellate session or division thereof, if it deems that the public importance of same justifies a deviation from the ordinary proceeding and a direct adjudication by the Supreme Court. The exceptional writ of certification may be issued only at the request of a party once the writ of appeal or of review is filed in the Superior Court. The filing of a petition for certification shall not stay the proceedings before the Superior Court, but the latter may not render

judgment in the case unless the Supreme Court denies the petition for certification.

(d) The judgments rendered by the Superior Court in appeals originated in the District Court and in review actions based on the record of the proceedings at administrative level, the decisions, orders or resolutions of administrative organizations, may be reviewed by the Supreme Court through certiorari to be issued at its discretion and not otherwise.

(e) The judgments rendered by an appellate session or division in criminal cases originated in the Superior Court shall be reviewed by the Supreme Court exclusively through certiorari to be issued at its discretion. The judgments rendered by said appellate session or division in criminal cases originated in the District Court shall be reviewable by the Supreme Court through certiorari only when a substantial constitutional question is presented. Any other judgment, dictum or resolution rendered by the appellate session or division may be reviewed by the Supreme Court through certiorari to be issued at its discretion and not otherwise.

(f) Any resolution rendered by the Superior Court may be reviewed by the Supreme Court through certiorari to be issued at its discretion and not otherwise.

(g) The filing of a bill of appeal in a case where the appropriate action is a writ of review shall not be sufficient ground for dismissal; and in such case the bill of appeal shall be considered for all pertinent purposes as if it were a petition for a

writ of review duly filed before the Supreme Court on the date on which it was filed in the Secretariat of the Superior Court. Nor shall it be sufficient ground for dismissal the fact that a party petitions for a writ of review against an appealable judgment; and in such case the petition for a writ of review shall be considered for all pertinent purposes as if it were a bill of appeal duly filed before the Superior Court.

3. Rule 36 of the Puerto Rico Rules of Civil Procedure. P.R. Laws Ann. Tit. 32, App. II R 36.

Rule 36. Summary Judgment

36.1 For claimant

A party seeking to recover upon a claim, counterclaim, cross-claim, or third-party claim, or to obtain a declaratory judgment may, at any time after the expiration of 10 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

36.2 For defending party

A party against whom a claim, counterclaim, cross-claim or third-party claim is asserted or a declaratory judgment is sought may at any time move, with or without supporting affidavits, for a summary judgment in his favor as to all or any part thereof.

36.3 Motion and proceedings thereon

The motion shall be served upon the adverse party at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Such judgment may be rendered for or against either party to the action.

36.4 Case not fully adjudicated on motion

If on motion under Rule 36 judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

36.5 Form of affidavits; further testimony

Supporting and opposing affidavits shall be made on personal knowledge of the affiant, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. If a motion for summary judgment is supported in the manner provided by Rule 36, the opposing party may not rely solely on the assertions or denials made in the pleadings, but shall be bound to answer in such detail and specifically as the moving party would have done, stating those material facts which in his judgment he seeks to establish. Upon failure to answer under oath judgment shall be rendered against him.

36.6 When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained, or depositions to be taken, or discovery to be had, or may make such other order as is just.

36.7 Affidavits made in bad faith

Should it appear to the satisfaction of the court that any of the affidavits presented is presented in

bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

4. Rule 34.6 of the Puerto Rico Rules of Civil Procedure, P.R. Laws Ann. Tit. 32, App. II R 34.6.

34.6 [Time to use mechanisms]

Mechanisms to discover evidence established and regulated by Rules 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33 may only be initiated and used by the parties within the term of sixty (60) days reckoned from the date the answer to the complaint was served, unless the court discretionally, at the request of a party and for justified reasons not ascribable to carelessness or indifference of the party requesting the extension or of his attorney, and under the conditions that it deems just, may extend such term.

In counterclaims, third-party claims, cross claims, the term shall be reckoned from the date of the answer thereto. The court, discretionally and for founded reasons, may shorten or extend said term under the conditions it may deem just and that guarantee the prompt solution of the controversies.

5. Rules 39.2 and 39.3 of the Puerto Rico Rules of Civil Procedure, P.R. Laws Ann. Tit. 32, App. II R 39.2 and R 39.3.

39.2 Dismissal

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 43.1. Unless the court in its order for dismissal otherwise specifies, a dismissal under Rule 39.2 and any dismissal, other than a dismissal for lack of jurisdiction or failure to join an indispensable party, operates as an adjudication upon the merits.

39.3 Dismissal of counterclaim, cross-claim, or third-party claim

The provisions of Rule 39 apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Rule 39.1(a) shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.